CLIMATE CHANGE: THE REAL THREAT TO DELAWARE CORPORATE LAW, WHY DELAWARE MUST KEEP A WATCHFUL EYE ON THE CONTENT OF POLITICAL CHANGE IN THE AIR

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"The pessimist complains about the wind; the optimist expects it to change; the realist adjusts the sails."
William Arthur Ward[1]

I. INTRODUCTION

Delaware is the corporate law capital of America.[2] However, when the blowing winds of change alter the environment in which it operates, simply maintaining its bearing will not keep Delaware on course. This article outlines the tactics Delaware must execute in a changing political climate to successfully maintain its course as the leader in corporate law. To understand these tactics one must first be familiar with Delaware's current bearing and the environment in which it navigates by appreciating the origins of Delaware's preeminence and the strengths of its system. Equipped with this knowledge one will then be prepared to identify and assess potential threats.

Section two of this article begins with a discussion of the history of corporate law in America, the origins of Delaware's rise, and the significance of Delaware's strengths. Next, section three outlines and evaluates common views of Delaware's role in corporate law, including the race theories of a race to the top or race to the bottom, and symbiotic federalism. Then, section four discusses and dismisses several potential threats to Delaware corporate law. Section five outlines Delaware's current strategy to maintain its course of corporate law predominance. A casual navigator of this article may choose to skip these initial sections, opting to dive directly into the deep waters of the new and intriguing perfect storm described in section six. However, even if one begins the voyage of this article well prepared, aware of Woodrow Wilson's significance and able to quote the works of Kahan and Rock, there is considerable foundational and

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[1] WILLIAM ARTHUR WARD, FOUNTAINS OF FAITH (Droke House 1970).
[2] Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's State in Corporate Law*, 34 DEL. J. CORP. L. 57, 66 (2009).

analytical benefit gained by investing a few moments to enjoy the familiar concepts presented in these introductory sections. Such a reading will ensure smooth passage through the final section with a more precise understanding of the tactics Delaware must execute and the strategic reasons underlying them.

II. RISE OF THE SMALL WONDER

A. *Internal Affairs Doctrine (IAD)*

Delaware's continued corporate law preeminence is largely due to the Internal Affairs Doctrine (IAD). The IAD prescribes that the law of the state of incorporation govern a corporation's internal affairs, primarily the decisions made by corporate leaders, and the fiduciary duties associated with those decisions.[3] Historically, this doctrine has been followed both horizontally between states and vertically between individual states and the federal government.[4] However, recent developments have raised questions as to whether states *must* follow the IAD as an absolute rule.[5] The Delaware Supreme Court was quick to answer those questions, invoking not only longstanding historical precedence, but also the United States Constitution.[6] Although history appears to show that the law of the state of incorporation governs the internal affairs of the corporation, throughout corporate law history in America, the types of entities permitted to incorporate has varied considerably.

B. *History: Thank You Woodrow Wilson*

In the beginning the luxury of incorporation was permitted only for a specific purpose, such as infrastructure-based firms, and firms with real assets, such as those in the railroad and telephone industries.[7] Prior to

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[3] VantagePoint Venture Partners 1996 v. Examen, Inc. 871 A.2d 1108, 1112-13 (Del. 2005); Timothy P. Glynn, *Delaware's Vantagepoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U.L. REV. 91, 93 (2008) (analyzing the significance of this decision).

[4] Glynn, *supra* note 3, at 93.

[5] *See generally* Examen, Inc. v. VantagePoint Venture Partners 1996, 873 A.2d 318, (Del. Ch. 2005) (Venture capital firm owning eighty three percent of a corporation's preferred stock claimed California law applied, thus permitting preferred stockholders to vote as a separate class. Corporation moved for judgment on the pleadings. Under Delaware law and corporate charter all stockholders voted as a single class, corporation was incorporated in Delaware and merger did not implicate national policy to support exception to internal affairs doctrine).

[6] *VantagePoint Venture Partners 1996*, 871 A.2d at 1113 (the authority of the Delaware court's decision and the validity and significance of the IAD will be discussed further in section four).

[7] Dittman v. Distilling Co. of Am., 54 A. 570, 571 (N.J. Ch. 1903).

1893, corporations had no authority to "purchase or hold the stock of other corporations."[8] New Jersey changed the tide when it introduced the idea of allowing holding companies — companies whose assets may consist of solely other companies — to incorporate.[9] This catapulted New Jersey to the forefront of corporate law in America. Holding companies across the nation raced to the Garden State to incorporate.[10]

Shortly after this shift, Delaware decided to similarly attract corporate charters by changing its system to mirror that of the revolutionary New Jersey model.[11] However, by this point New Jersey had developed significant network advantages. The value of the New Jersey system increased exponentially with each additional firm that incorporated in New Jersey. This substantial market power resulted in a barrier to entry for other states, even if they mirrored the New Jersey system they were not New Jersey.[12]

Then along came Woodrow Wilson. In 1910, Wilson was elected governor of New Jersey, but he had bigger plans - presidential plans. As governor, Wilson rapidly began his campaign for the presidency and, in an effort to secure national popular support, he embarked on a crusade to dismantle the New Jersey system that had led to its preeminence in corporate law. Wilson proposed the "Seven Sisters," seven bills creating an exceptionally broad antitrust system that went so far as to even forbid small competing retail businesses from agreeing to close on Saturday afternoons to spend more time with their families.[13] This crusade began to gather national traction, and in 1913, shortly after Wilson's last speech as governor, New Jersey enacted the Seven Sisters.[14] A few months later in the presidential election Wilson lost his home state of New Jersey; however, largely due to his tactical enactment of the Seven Sisters he found himself headed to the White House.[15] In the wake of the Seven Sisters, corporations suddenly began to evaluate their chartering decisions, and as Wilson left New Jersey, so did the corporations.[16]

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[8] *Id.* at 571.
[9] *Id.*
[10] Christopher Grandy, *New Jersey Corporate Chartermongering, 1876-1929*, 49 J. ECON. HIST. 677, 679 (1989).
[11] E. Norman Veasey, *Musings From the Center of the Corporate Universe*, 7 DEL.L.REV 163, 166-67 (2004).
[12] *Id.* at 67.
[13] LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 6 (2005).
[14] *Id.*
[15] *Id.*
[16] *Id.*

A Gladwellian analysis reveals that in 1913, Delaware, with its legal system solidly established and firmly rooted in the ideas of the original New Jersey model, was uniquely prepared for this opportunity.[17] At the very moment corporations were abandoning the sinking New Jersey ship, the Delaware corporate law vessel was nestled safely across the inland Delaware River.[18] With the New Jersey network economies eliminated by the Wilson crusade and Delaware positioned and immediately ready to step in, the small wonder acquired a valuable first mover advantage and the corresponding network economies that followed as corporations began to flood the banks of Wilmington.[19] This shift in the corporate landscape has continued through today, with the majority of corporations continuing to choose to incorporate in Delaware.[20]

C. *Strengths of the Delaware System*

Because of the IAD, the strengths of the Delaware system are the significant pillars underlying Delaware's sustained corporate law leadership. These strengths include: the enabling Delaware corporate law statute; a capable, stable, and efficient court system; the breadth of well-developed common law; the specialized Delaware bar; and the client-focused Division of Corporations. Also, as Mark Roe eloquently articulated, there appears to be an implicit government guarantee in the quality and stability of Delaware corporate law.[21] Each of these strengths is valuable to Delaware's current and future corporate law success.

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[17] *See generally* MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS (2008) (introducing the concept of 10,000 hours).

[18] *Id.*

Prologue

TABLE 1. New Corporate Charters Issued

Year	New Jersey	Delaware
1884	232	—
1899	2,186	421
1903	2,035	746
1907	1,840	671
1911	1,856	1,342
1913	1,445	1,613
1915	1,428	1,916
1918	1,272	2,460

Source: George Heberton Evans, Jr., *Business Incorporations in the United States 1800–1943* (New York: National Bureau of Economic Research, 1948), 101, 126–27. Copyright 1948 by National Bureau of Economic Research.

[19] LoPucki, *supra* note 13, at 7.

[20] *Id.*

[21] Mark J. Roe, *Is Delaware's Corporate Law Too Big to Fail?*, 74 BROOK. L. REV. 75, 82 (2008).

1. *Enabling Delaware General Corporation Law (DGCL)*

The strength of the system begins with the enabling Delaware General Corporation Law (DGCL). The DGCL is Delaware's flexible enabling code that has remained consistent for over forty years.[22] Although the Delaware State Constitution is technically the formal authority for the DGCL, there is only one relevant constitutional provision - the provision requiring a super majority vote of both houses of the state legislature in order to make any amendments to the DGCL.[23] This guaranteed constitutional requirement of a two-thirds majority for any amendment is unique to the DGCL, unlike any code in the state.[24] Because of this constitutional hurdle, statutory changes are generally slow and gradual - a feature corporations tend to appreciate. Further, any additions to the code generally originate from the Corporate Law Council of the Delaware bar association.[25] The researched suggestions of the council are then generally adopted by the legislature.[26] Further, the DGCL is an enabling statute in that it provides broad guidelines, allowing details such as the duties of corporate board members to be flushed out by the common law of the court system.

The legislature does not micromanage the courts; rather it allows them to develop a stable body of law; however, if significant mistakes do occur in the creation of common law, the system is able to move swiftly to correct any uncertainty. There are few examples of such mistakes. In fact some argue that during "the modern era, there has been only one significant instance."[27] The legislature's ability to quickly address problems was evidenced by the swift adoption of Section 102(b)(7), which mitigated the sting of the *Van Gorkom*[28] decision, by enabling corporations to adopt

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[22] Lawrence A. Hamermesh, *Panel Three: Sarbanes-Oxley Governace Issues, The Policy Foundations of Delaware Corporate Law*, 106 CLMLR 1749, 1752 (2006).
[23] DEL. CONST. art. IX, §1.
[24] Chancellor William B. Chandler III, Fiduciary Responsibilities of Corporate Board Members Lecture Series at Moritz College of Law, The Ohio State University (Mar. 20, 2009).
[25] Hamermesh, *supra* note 22 at 1753.
[26] Lawrence Hamermesh, *How We Make Law in Delaware, and What to Expect From Us in the Future*, 2 J. BUS. & TECH. L. 409, 410 (2007).
[27] Marel Kahan & Edaward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1595-96 (2005) (explaining the legislatures allowance of exculpatory provisions in response to uncertainty introduced by the broadening of the duty of care in *Smith v. Van Gorkom*. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)).
[28] *Van Gorkom*, 488 A.2d at 858

exculpatory provisions protecting decisionmakers from personal liability.[29] Thus, the stable enabling DGCL strengthens the Delaware system.

2. *Capable, Stable and Efficient Court System*

Like the stable DGCL, Delaware's stable court system is one of its significant strengths. Delaware's efficient court system is comprised of a collaborative trial court (the Court of Chancery) and a supreme court.[30] The Chancery is appointed in a non-political process, rather than being elected.[31] This process is further checked by a requirement of bi-partisan representation amongst the judges, thus ensuring chancellors are beholden only to the law and its efficient execution; they have no interest in possessing a bully pulpit to espouse their beliefs to the citizens of Delaware.[32] Many states do not have a judiciary system structured in such a non-partisan, disinterested fashion. When an official is elected, rather than earning a position based on an objective assessment of qualifications, one may argue that his or her incentives may differ from those of the Delaware Chancery. Perhaps having a microphone might be useful if an elected official must appeal to a populace base for regular re-election. The non-partisan Delaware selection process ensures the Chancellor position is held by the most capable individuals.

The non-partisan Chancery further adds to Delaware's strengths through its collaborative climate. The Delaware Vice-Chancery is arguably the only collaborative trial-court in America.[33] This collaboration adds an additional layer of consistency to the stable Delaware common law, and is even evidenced in the process of selection for Delaware clerks.[34]

The Delaware court system further provides for stable and efficient results by requiring all corporate law issues to be heard by this specialized non-partisan Court of Chancery, without juries or punitive damages, thus minimizing emotional and uncertain outcomes.[35] The ability of the Chancery to act swiftly and precisely is nearly unmatched in the legal world. If a corporation fails to hold an annual shareholder meeting as required under DGCL §213, the efficient Court of Chancery will hold a proceeding nearly immediately, generally within only a few days of the violation.[36] Further efficiency is visible in the Delaware appeal process.

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[29] DEL. CODE. ANN. tit. 8, §102(b)(7) (2005).
[30] Chandler, *supra* note 24.
[31] DEL. CONST. art IV, §3.
[32] *Id.*
[33] Chandler, *supra* note 24.
[34] *Id.* (discussing how clerkship applications are submitted to and reviewed by all five vice chancellors).
[35] *Id.*
[36] *Id.*

Appeals of corporate law issues are heard directly by the Delaware Supreme Court.[37] This structure provides certainty by enabling rapid resolution of corporate law issues. Thus Delaware's stable and efficient court system further strengthens Delaware's corporate law preeminence.

3. *Breadth of Well-Developed, Fact Intensive, Stable Common Law*

Delaware views the common law as a framework that outlines a consistent structure for key issues, with the specific facts of those issues viewed individually. This belief that "complex facts cannot and should not be reduced to black letter codification" is a clear benefit to the Delaware system.[38] This structure enables the court to apply a stable set of rules to difficult situations, many of which are fact-laden and by definition rooted in equity.[39] Further, this attribute ensures the Delaware system cannot be easily duplicated in other states by merely replicating a statute; the robust body of common law generates lasting network advantages.

In contrast, states that follow the Model Business Corporation Act have attempted for over twenty years to generate "a bright-line framework" to assess the duties of directors.[40] Delaware's rich and stable common law distinguishes it from these rigid code jurisdictions, shielding it from the dangers of the imperfect results that may be generated from such unbending requirements.[41]

Although Delaware is exceptionally fast moving and efficient when viewed from the perspective of an individual case, changes to the robust common law occur at a conservative pace; doctrinal changes are generally both slow and incremental.[42] Established precedents remain consistent over time, ensuring an environment that respects business' need for reliable informed decisions, thus increasing certainty.[43] Specifically, Delaware's renowned "business judgment" rule has methodically evolved, reliably providing a presumption in favor of directors' decisions.[44] Bit by bit the doctrine has matured, fleshing out the presumption that directors: are

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[37] *Id.*
[38] Hamermesh, *supra* note 22, at 1777.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Chandler, *supra* note 24.
[43] Omari Scott Simmons, *Branding of the Small Wonder: Delaware's Dominance and the Market for Corporate* Law, 42 U. RICH. L. REV. 1129, 1158 (2008).
[44] Robinson v. Pittsburgh Oil Ref. Corp. 126 A. 46, 49 (Del. Ch. 1926); Aronson v. Lewis 473 A.2d 805, 811 (Del. 1984).

disinterested, act in good faith, and with a rational business purpose, and consider "all material facts reasonably available."[45] This measured and deliberate evolution ensures both fairness and equity are addressed without disturbing the fine balance of certainty. Thus Delaware's well-developed and stable common law further strengthens Delaware's corporate law preeminence.

4. *Specialized Bar and the "Saints and Sinners" of Delaware Law*

In addition to the network advantages of its robust common law, Delaware's specialized bar is a further strength that sustains its preeminence. The Delaware bar is comprised of a small group of members who have successfully navigated a rigorous selection process.[46] This small community is tight-knit and as such, reputations are of the utmost importance.[47] Although the Court of Chancery may not have the authority to hold counsel or business leaders responsible for all questionable behavior, they are more than capable of *dressing them down* through their own unique Delaware method, commonly referred to as the *saints and sinners* of Delaware law.[48] Through their opinions, Delaware chancellors are able to enforce an overarching moral standard.[49]

A recent example of the *saints and sinners* method is found in Chancellor William Chandler's *Disney* opinion.[50] In this meticulous and ordered decision, although he found that none of the directors had breached their fiduciary duties, Chandler took the time to make a public example of many of the participants.[51] Specifically, Chancellor Chandler accurately and eloquently described general counsel Litvack's testimony as "pathetic."[52] In the same opinion, Chandler paused to carefully describe the actions of two participants as "a shameless public relations move."[53] These types of public reprimands are unique tools enabling the Delaware chancery to maintain certainty through the promotion of consistent behavior by the Delaware corporate law community. The intimate nature of the Delaware

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[45] Brehm v. Eisner, 746 A.2d 244, 264 N. 66 (Del. 2000).
[46] Chandler, *supra* note 24.
[47] *Id.*
[48] *See generally*, Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles* (Mich. St. L. Rev., Working Paper No. 09-19, 2009) (describing the history and usage of the *Saints and Sinners* of Delaware corporate law).
[49] *Id.* at 13.
[50] *See generally,* In re The Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005).
[51] *Id.*
[52] *Id.* at 777.
[53] *Id.* at 726.

bar, coupled with the ability of the chancery to enforce normative behavior, are significant strengths that maintain Delaware's preeminence.

5. *Client-Focused Delaware Division of Corporations*

Delaware's system, beginning with the enabling DGCL, is filled with unique strengths. The non- partisan Chancery system utilizes several unique tools as it creates and interprets the robust Delaware common law and enforces the enabling DGCL. The specialized bar further adds to this efficient system. One often overlooked arrow in Delaware's quiver is the client-focused Division of Corporations. This state agency efficiently facilitates the incorporation process.[54] Like the efficient chancery courts the division offers expedited service.[55] The division's user-friendly online system enables creation of a corporation in a matter of minutes.[56] This customer-focused efficiency rarely found in government bureaucracies further adds to Delaware's preeminence.

D. *Current Effect of Delaware's Preeminence*

Delaware's many strengths have uniquely positioned this geographically small state to reap large benefits. Today more than 850,000 businesses are legally domiciled in Delaware.[57] This includes over 63% of all Fortune 500 companies, and one-half of the companies listed on the NYSE and NASDAQ![58] Further, on an ongoing basis 75% of all initial public offerings in the United States are incorporated in Delaware; this is 150,000 new incorporations annually.[59] To look at it another way, over 97% of all United States companies are either incorporated in Delaware or their home state.[60]

What does this massive domination of the corporate law market mean for Delaware? The roughly $750-800 million generated every year through corporate franchise fees accounts for approximately one-fourth of the entire Delaware State budget.[61] These revenues enable Delaware to

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[54] Division of Corporations – About Agency, State of Delaware, http://corp.delaware.gov/aboutagency.shtml (last visited Jan. 28, 2010).
[55] *Id.*
[56] One Stop Business Regulation and Licensing, State of Delaware, https://onestop.delaware.gov/osbrlpublic/Home.jsp (last visited Jan. 28, 2010).
[57] About Agency, *supra* note 54.
[58] *Id.*
[59] Chandler, *supra* note 24.
[60] Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U.L REV. 1559, 1562 (2002).
[61] Chandler, *supra* note 24.

maintain its current structure of zero sales tax; yes, tax-free shopping is yet another strength the small wonder has to offer.[62] With such high stakes involved it is easy to see why Delaware is committed to continually improving its strengths; strengths that cannot truly be understood alone. Although the individual components of a ship will sink if plunged into the sea alone, when properly machined and assembled they enable a vessel to weather even the most difficult storm. Here, when used together Delaware's strengths enable smooth sailing across the most challenging corporate law waters.

III. IMPOSING PYGMY OR SMALL WONDER?

Traditionally the law of the state of incorporation governs the internal affairs of a business[63] while the federal government provides a layer of governance that primarily addresses external issues such as disclosure and securities.[64] The consequences of this structure have generated much scholarly discussion resulting in the evolution of multiple views of the system. This section will explore both the highly debated race views and the more recent view of symbiotic federalism. The purpose of the following discussion is not to promote any individual view, rather to lay a foundation for the discussion of potential threats found below in section four.

A. *Race View*

The value of the corporate charter market is significant; it is possible for a state to generate nearly one fourth of its entire annual budget from these chartering fees alone.[65] Since the authorization of holding companies — which led to New Jersey's corporate dominance — conversations have developed concerning the incentives these fees provide. The question is whether the value of corporate charters incents states to cater to the whims of corporate decisionmakers in an effort to attract charters — the race to the bottom, or whether the incentive is to provide a superior and more efficient corporate law product — the race to the top.[66]

1. *Race to the Bottom*

In 1974, William Cary wrote that Delaware is a "pygmy" that "prescribes, interprets, and indeed denigrates national corporate policy as

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[62] *Id.*

[63] *See supra* notes 3-7 and accompanying text.

[64] Timothy P. Glynn, *Delaware's VantagePoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 93 (2008).

[65] Chandler, *supra* note 24.

[66] Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2493-94 (2005).

an incentive to encourage incorporation within its borders, thereby increasing its revenue."[67] Cary and others claim that Delaware's enabling statute has led to the watering down of corporate law across America.[68] As Delaware endeavors to retain and attract corporations it holds strong to its enabling statute.[69] Why? Those who believe in this race would argue that it is because, although a corporation may be owned by thousands of shareholders, the decision of where to incorporate is made by a few select executives and directors. In an effort to attract those key decisionmakers and compete for the valuable charters directors control, many states have duplicated much of the Delaware statute, thus diluting nearly all of American corporate law.[70]

Cary suggests "there is no public policy left in Delaware corporate law except the objective of raising revenue."[71] This competition prompts Delaware to ignore agency problems and lean even further toward "minimal standards of director responsibility."[72] Corporate decisionmakers race to states with legal systems that offer them, as individuals, little responsibility and great protection.[73] This race to the bottom compounds the issue of separation of ownership and control, within organizations, exploiting shareholders through the eradication of the "concept of fiduciary responsibility and fairness."[74] This logic has prompted some commentators to call for various levels of federal intervention to combat this race.[75] The race to the top provides an alternate perspective.

2. *Race to the Top*

The "race to the top" position holds that state systems have not devolved, ignoring basic shareholder protections and value; rather, just the opposite has occurred. Delaware is the small wonder not only because of the significant number of incorporations it holds relative to its geographical size, but also because of the magnitude of the positive influence it has had on the corporate law of America. The competition for corporate charters

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[67] William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 701 (1974).
[68] *Id.* at 665.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 684.
[72] *Id.* at 672.
[73] *Id.*
[74] *Id.* at 696.
[75] *Id.* at 700-01 (arguing for minimum corporate law provisions applicable to all corporations).

has led to the evolution of stable and efficient corporate law across the country. It has been a race to the top![76] Unlike the previous view, the race to the top recognizes that in the competition for corporate charters states are incentivized to create systems that encourage investors to invest, and creditors to extend credit. Without such activities it is difficult, if not impossible for an organization to succeed. Therefore, the race encourages efficient corporate law that reduces operating costs and provides higher returns to shareholders.[77] Corporations that choose to reincorporate in states such as Delaware do not reduce shareholder value — they increase it.[78]

If the race were to the bottom, one would expect to find the worst of the worst in the state that was arguably winning that race. Delaware should be the home to every fraud-committing, regulation-skirting organization, but this is simply not the case. As Professor Stephen Bainbridge aptly noted, "the two main poster-children for reform, Enron and WorldCom, were not Delaware corporations," rather they were incorporated in Oregon and Georgia, respectively.[79] The draw of Delaware is not the lawless Wild West image promoted by some commentators.

If one were to assume the race is actually to the bottom, then it would logically follow that if Delaware acted inconsistent with such a view then the small wonder would see its dominance vanish. Again, this is simply not the case. Even if Delaware chose to gradually decrease the protections it provides to the decisions of directors, or increase the fiduciary duties of corporate board members, these actions alone would not result in corporate flight. They would be insufficient to overcome, or even neutralize, Delaware's strengths and network advantages.

As discussed above, the value of the Delaware system is not merely its law, rather an entire host of certainty-promoting strengths: the efficient, competent, non-partisan judiciary; the highly skilled corporate bar; volumes of rich clarifying common law; and the stable enabling DGCL. Each of these strengths is bolstered by and adds to the network advantages generated from the significant number of Delaware corporations. These strengths cannot be erased merely by adjustments to the legal rules, so long as the certainty they provide remains. If changes are made deliberately, and are reflected consistently through the entire Delaware system, then the

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[76] Judge Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POL'Y 127, 128 (1982).

[77] Roberta Romano, *Law as a Product, Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 265 (1985).

[78] *Id.* at 272.

[79] Stephen M. Bainbridge, *Remarks on Say On Pay: An Unjustified Incursion On Director Authority* 5—6 (UCLA Law & Economics Research Paper Series, Research Paper No. 09-06, 2008).

small wonder will maintain its corporate law primacy. The ability of directors to make decisions with an awareness of the effects of those decisions is the true benefit, not merely a body of law that may on its surface have a reputation of leniency. The Delaware structure promotes this required certainty. Therefore additional federal intervention is unnecessary, and may actually lead to uncertainty and lower returns for shareholders.[80]

B. *Symbiotic Federalism*

A more recent approach promoted by Marcel Kahan and Edward Rock suggests that the Delaware system is not necessarily driven by the pressures of a race to the top or bottom; rather it evolves through a symbiotic relationship with the federal government.[81] Both the federal government and Delaware benefit from this relationship. Delaware is not forced to pour resources into a massive regulatory agency to monitor issues like securities trading, and the federal government benefits from Delaware's nimble ability to respond to new developments and its capacity to create and apply superior rules than those likely to emerge from a federal bureaucracy.[82] Symbiotic federalism does not mean that "Delaware behaves as if it were an instrument of the federal authorities."[83] Nor does it imply that an individual state has the ability to control Congress.[84] Symbiotic federalism recognizes the *possibility* of federal preemption; however, this will only occur if a populist groundswell forces the federal government to abandon this mutually beneficial relationship with Delaware.[85]

One recent example of this symbiotic relationship is found in the 2008 Bear Stearns shareholder litigation.[86] Delaware, recognizing the scope of the matter before it, allowed the federal government to handle an issue that would likely tarnish the reputation of the Delaware system in the eyes of the general public and those in Washington.[87] However, this case,

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[80] Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913, 919-20 (1982).

[81] *See generally* Kahan & Rock, *supra* note 27.

[82] *Id.* at 1576, 1587.

[83] Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?* 21 OXFORD REV. ECON. POL. 212, 223 (2005).

[84] *Id.*

[85] Kahan & Rock, *supra* note 27, at 1576.

[86] In re Bear Stearns Cas. S'holder Litig, No. 3643-VCP, 2008 Del. Ch. LEXIS 46 (Del. Ch. Apr. 9, 2008).

[87] *Id.*

and others like it, highlights the "chicken or egg" weakness of the notion of symbiotic federalism. One scholar has commented that state law exists merely at the whim of federal authorities, asserting that Congress and federal agencies are the true masters behind corporate law.[88] When federal authorities act, it is because they dislike a state law; when they do not act, it is merely because they "tolerate" a state law.[89] Regardless of one's own beliefs, one thing is clear — there is a fine line between a symbiotic and subservient relationship.

IV. POTENTIAL PERIL

The traditional conversations of a race to the top or bottom fail to address the true threat to Delaware corporate law. The notion of symbiotic federalism begins to raise valuable issues; however, it too falls short of a complete description of the potential peril on the horizon for Delaware. The issue is not simply whether corporations will leave Delaware for smoother waters in states like Pennsylvania; nor is it whether the Congress will introduce a federal chartering system, or even whether the federal government will gradually preempt Delaware law through incremental changes to the corporate law landscape. Like much in life and law, this issue is complex. It involves a combination of the above and an intricate social component that was only briefly described by Kahan and Rock.

A. *Horizontal Threats*

Horizontal threats to Delaware's corporate law preeminence exist in two forms: race and jurisdictional.[90] Race threats include the idea that Delaware corporate law generates either a race to the top, or a dangerous race to the bottom for the entire nation. While the more recent jurisdictional threats involve strategic maneuvers by select individual states. Each threat presents its own challenges.

1. *Race Horizontal Threats*

Those who promote the race to the bottom argue that Delaware battles a constant threat from competing states. As those states duplicate the enabling DGCL and further modify their statutes to offer even greater protections to corporate decisionmakers, Delaware must also evolve or face certain loss of its valuable corporate charters. However, another argument could be made that this is simply not the case. Corporations will not flee Delaware any faster than users abandon Microsoft or Apple when an

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[88] Mark Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 592 (2003).
[89] *Id.*
[90] Cary, *supra* note 67, at 665-66 (describing the horizontal race threat); Stevelman, *supra* note 2, at 96-97 (describing the horizontal jurisdiction threat).

unknown startup rolls out a shiny new operating system. Why? The answer to that question is twofold: network advantages and certainty.

The very network advantages that prohibited Delaware from surpassing New Jersey in the early 1900s now work to maintain Delaware's position. As the New Jersey system held strong, until it was sabotaged from within, Delaware will maintain its position without the need to aggressively produce shiny new law.

The certainty concept requires a bit more discussion. On the surface it may sound unconventional, but human beings are comfortable with risk. With risk we are able to quantify possible outcomes and make decisions based on our risk tolerance levels. The amount of risk an individual or organization may tolerate varies dramatically. But within those levels we are comfortable with risk.

Uncertainty is something "radically distinct" from this "familiar notion of risk."[91] Uncertainty is non-quantitative, and cannot be measured; as such, it cannot be properly hedged.[92] In order to make effective and efficient decisions, corporate leaders must know with some degree of certainty what rules will govern their actions. When incorporators select a state, they enter into an implicit contract with shareholders and contracting parties that the law of that state will govern their internal affairs.

The feature of predictable outcomes, whatever those outcomes may be, is a distinct benefit that provides business leaders an opportunity to weigh their decisions or possibly even structure "commercial transactions to avoid litigation altogether."[93] Because of these decisionmaking needs, organizations largely select their state of incorporation with a distinct focus on certainty.[94] Even if another state is able to duplicate the enabling DGCL and provide superior service through its administrative agency, it is impossible to duplicate the robust common law that Delaware has developed over the past century. This common law and the entire structure of the Delaware system provide the certainty that both decisionmakers and shareholders require.

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[91] FRANK KNIGHT, RISK UNCERTAINTY AND PROFIT 19 (The Riverside Press Cambridge 1921); *see generally* Daniel A. Farber, *Uncertainty* (UC Berkeley Public Law Research Paper No. 1555343, 2010), *available at* http://papers.ssrn.com/sol3/paper s.cfm?abstract_id=1555343 (providing in depth analysis of uncertainty).

[92] *See* Knight, *supra* note 91, at 20.

[93] Fischel, *supra* note 80, at 942.

[94] Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance*, 21 OXFORD REV. ECON. POL. 212, 219 (2005).

2. *Jurisdictional Horizontal Threats*

In section two we briefly explored the Internal Affairs Doctrine (IAD), and suggested that recent developments raised questions as to whether states *must* follow this doctrine as an absolute rule.[95] Delaware's legitimacy rests in its strengths and the broad authority it derives through the IAD. Thus, certainty of the internal affairs doctrine is critical to Delaware's continued preeminence. Although the Model Business Corporation Act (MBCA) contains an explicit provision providing that the state where litigation is brought can*not* apply its own law to the internal affairs of the corporation (rather it *must* apply the laws of the domicile state),[96] the jurisdictional horizontal threat still remains. Both California and New York have enacted statutes disavowing part of the internal affairs doctrine.[97] This encroachment poses some danger to Delaware. If the underlying certainty of what law shall govern the internal fairs is eroded, then corporations will have less incentive to continue to incorporate in Delaware.

In *VantagePoint* Delaware quickly stepped in to prevent any erosion of the IAD, citing both the long standing IAD and the United States Constitution.[98] Whether or not this assertion will be sufficient to weather the test of time has yet to be determined.[99] However one thing is clear, the federal government, specifically Congress through their powers granted under the Commerce Clause, may step in at nearly any moment, either grasping the helm and turning the ship completely, or simply selecting a new bearing and ordering the captain to adjust course.

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[95] *See supra* notes 3-7 and accompanying text.

[96] MODEL BUS. CORP. ACT § 15.05(c) (2002).

[97] *See* CAL. CORP. CODE § 2115 (2001) (requiring that if a foreign corporation earns more than fifty percent of its revenue within California, then it shall be governed by California law); N.Y. BUS. CORP. LAW §1317-20 (McKinney 2002) (stating that directors of foreign corporations doing business in New York are subject to New York law "to the same extent as directors and officers of a domestic corporation").

[98] *Vantage Point Venture Partners 1996*, 871 A.2d at 1113 (discussing the Due Process clause: "The internal affairs doctrine is not, however, only a conflicts of law principle. Pursuant to the Fourteenth Amendment Due Process Clause, directors and officers of corporations "have a significant right . . . to know what law will be applied to their actions").

[99] *Vantagepoint* and a few commentators have recognized this threat; *see generally* Glynn, *supra* note 64; Donald C. Langevoort, *Federalism in Corporate/Securities Law: Reflections On Delaware, California, and State Regulation of Insider Trading*, 40 U.S.F. L. REV. 879 (2006).

B. *Vertical Threats*

Much like horizontal threats, vertical threats are visible in multiple forms. Delaware must be aware of the possibilities of both preemption through a comprehensive federal chartering system and the more dangerous threat of gradual federal preemption.

1. *Comprehensive Federal Chartering System*

Delaware largely owes its preeminence to the powers it is able to execute through the internal affairs doctrine. The question is whether the federal government must abide by this essential doctrine? Is Congress required to heed the IAD? The short answer is, no! Congress has the constitutional power to regulate interstate commerce.[100] If one questions whether Congress could step in, they need only look to the Supreme Court's decisions in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, and *Wickard v. Filburn*.[101] The Court has held that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[102] This broad congressional power was again expanded in 1942 when the Court further held that even if the individual effects of an activity are not substantial, the activity should be judged by its *aggregate* national effects when considering whether Congress's authority should be extended.[103] Therefore, Congress may create a federal chartering system, essentially sweeping the proverbial rug from under Delaware.

However, although the threat exists that Congress could shake all of corporate law like one giant etch-a-sketch, erasing Delaware in the process, in a normal environment, this would never occur. The issue of whether the representatives would be able to retain their seats in the following election slows the vigor of even the most aggressive legislators. Even Professor William Cary, in his initial declaration of the race to the bottom, argued that such a giant leap by the federal government was not the

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[100] U.S. CONST. art. I, §8, cl. 3; *see also generally Federal Chartering of Corporations: Constitutional Challenges*, 61 GEO.L.J. 123 (1972) (analyzing the Constitutionality of a federal charter system).

[101] National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); Wickard v. Filburn, 317 U.S. 111 (1942).

[102] *Laughlin*, 301 U.S. at 37.

[103] *Wickard*, 317 U.S. at 129.

necessary solution, nor was it likely even possible.[104] But, Professor Cary and others have suggested the need and possibility of *some* federal standards.[105]

2. *Gradual Preemption*

Cary and others have argued for systems where companies are free to incorporate in the state of their choice, but are subject to federal jurisdiction for certain blanket requirements.[106] As Cary noted, although companies will remain free to select their state of incorporation, it is likely that the federal standards will "remove much of the incentive to organize in Delaware."[107] Although such a system has never been formally proposed, today, inch by inch, the federal government is stepping in and occupying some of the space that Delaware operates. This is visible through: SEC regulations, exchange listing rules, and the occasional incursion into the sacred realm of fiduciary duties.

As these changes occur, one might believe that Delaware would embrace the extra hands on deck. As such a truly *small* wonder, one may imagine that it would confront many logistical challenges in the face of issues like regulatory enforcement. Such seemingly helpful federal assistance is exactly what the notion of symbiotic federalism rationalizes.[108] This encroachment allows Delaware to nimbly focus on what it does best — responding to new developments through the creation and efficient application of exceptional common law rules — thus promoting the certainty that a massive federal bureaucracy could arguably never provide.[109]

However, with each step the federal government takes, Delaware's marginal corporate utility is diminished. The passage of the Public Company Accounting Reform and Investor Protection Act, commonly referred to as the Sarbanes-Oxley Act of 2002 (SOX) brought a new wave of gradual preemption.[110] No longer may companies decide whether to provide loans to their dedicated officers; this decision has been made by the government – and the answer is no.[111] What does this mean for Delaware? The result does not change simply because the rug is being pulled slower. Corporations now have less incentive to reincorporate in Delaware.

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[104] Cary, *supra* note 67, at 701.
[105] *Id.* at 700-02.
[106] *Id.* at 702.
[107] *Id.*
[108] Kahan & Rock, *supra* note 27, at 1587.
[109] *Id.* at 1576, 1587.
[110] Stevelman, *supra* note 2, at 90-91 (discussing the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745).
[111] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

Eventually, the space that Delaware occupies will be so small that any remaining network advantages will be rendered inert.

Further, stock exchanges serve a significant role as a "de facto branch of the federal government" in a regulatory sense.[112] Through their listing requirements, these private entities impose multiple governance standards.[113] One may ask how the listing requirements of private entities relate to the federal government, and vertical threats to Delaware. The logic is clear; since the passage of the Sarbanes-Oxley Act, Congress and the SEC have dramatically increased their role in regulation.

Is this what is actually happening? Is the federal government vigorously tugging on Delaware's rug? No. Since the introduction of the largely accounting based reforms of SOX, the federal government has politely declined to sully its hands with the meat of corporate law. Some of the boldest moves occurred only after the global economic crisis of 2008, and those efforts largely amounted to an *advisory* executive say-on-pay initiative.[114] As of today, nearly two years after the September 15, 2008, crash of Lehman Brothers, even this advisory, watered-down attempt at governance has yet to pass both houses of Congress.

In the aftermath of the global crisis one may have expected gradual, or even significant, federal preemption in the areas of fiduciary duties, executive compensation, proxy access, or perhaps even a rule forbidding chief executive officers from also simultaneously serving as the chairman of the board,[115] but this was not the case. For all the discussion of 2009, the year barely saw the SEC amend a rule related to broker-director elections.[116] The House managed to pass H.R. 4173 during the year;[117] however this so-called "Consumer Protection Act of 2009" barely includes say-on-pay language and as of early 2010, it is still languishing in the Senate, its ultimate fate uncertain. If this is an example of congressional

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[112] Stephen M. Bainbridge, *Delaware's Competition*, PROFESSOR BAINBRIDGE.COM, THE VOCATIONAL AND VOCATIONAL JOURNAL OF A CORPORATE LAW PROFESSOR, Nov. 13, 2009, http://www.professorbainbridge.com/professorbainbridgecom/2009/11/delawares-competition.html (last visited Jan 28, 2010).

[113] *Id.*

[114] *Id.* (discussing the possible requirement of an advisory shareholder vote on executive compensation).

[115] Posting of Francis H. Byrd, Looking Ahead at 2010 by Looking Back at 2009 to the Harvard Law School Forum on Corporate Governance and Financial Regulation, http://blogs.law.harvard.edu/corpgov/2010/01/17/looking-ahead-at-2010-by-looking-back-at-2009/#more-6306 (Jan. 17, 2010, 8:29 EST) (discussing NYSE Rule 452).

[116] *Id.*

[117] *Id.*

tugging, it is clear that there is limited threat of marginalization. The rug is firmly under Delaware and the small wonder's network strengths alone are sufficient to weather such a diminutive storm.

V. CURRENT COURSE, HOLD THE BEARING

The small wonder is an oak; sturdy and stable. If one closes their eyes and imagines an oak tree, it is unlikely that images of tiny saplings appear; rather the mind is flooded with vivid pictures of a strong and enduring tree, steadily growing, strengthening its mighty trunk, and ever deepening its massive roots. The oak does not sporadically shift left and right like an ivy planning its growth based upon the wind and weather of the day. The oak weathers storms and adjusts its course only gradually and over time. Similarly, as Delaware navigates the corporate law sea, it does so in its sturdy vessel, buttressed by its many strengths: the enabling DGCL; its capable, stable, and efficient court system; its breadth of robust common law; the specialized bar; and its client focused Division of Corporations.

Delaware charted its course while New Jersey dominated the market. The small wonder reached its current prominence only after New Jersey faltered by dramatically changing its system. Since its rise following Woodrow Wilson's actions in the early 1900's, Delaware has apparently learned from the lessons of its neighbor. Changes to the enabling DGCL have been incremental.[118] Delaware rarely adjusts its course; regardless of the storm, it firmly maintains its bearing.

The extent of Delaware's adjustments is merely minor course corrections along the original bearing. In 2006 Delaware amended the DGCL to clarify that companies could, but were not required to, adopt non-staggered boards.[119] In 2008, the Delaware Corporate Law Council began to discuss possible additions to the slow changing and stable DGCL.[120] In 2009, Delaware clarified that its law permits shareholders the right to proxy access.[121] These small changes indicate that the Corporate Law Council appears to recognize that the environment is changing and some adjustments must be made to maintain their current course of corporate preeminence. Although Delaware has made a few bold stands,[122] the outward appearance is that adjustments will continue to be made in a fashion similar to that of the past half century, with only minor gradual changes to the DGCL coupled with rapid and precise acts by the Court of

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[118] Kahan & Rock, *supra* note 27, at 1576.
[119] Chandler, *supra* note 24.
[120] *Id.*
[121] H.B. 19, 145th Gen. Assem., Reg. Sess. § 2 (Del. 2009).
[122] *See, e.g., VantagePoint Venture Partners 1996*, 871 A.2d at 1108.

Chancery. The question is, when seas are rough will small corrections in speed and direction be sufficient to maintain the course?

VI. THE PERFECT STORM

"Anyone can hold the helm when the sea is calm."[123] Delaware's network strengths effectively shield it from most horizontal threats, and the potential political dangers of preemption generally keep the rug squarely under Delaware's feet. The real threat is the development and arrival of a perfect storm: a tipping point.[124] The threat is similar to the notion of awakening a sleeping giant; it involves the awakening of the populace. The threat is contingent upon the existence of an environment where Congress can act without concern for re-election. Such an environment could result in partial or even full preemption of the Delaware corporate law. This concept of the perfect storm is something distinct from that which has previously been discussed. Although symbiotic federalism briefly touches on the issue, even Professor Cary left the door open to total federal preemption "in the event of catastrophic depression or corporate debacle."[125]

Delaware is a "pygmy among the 50 states."[126] As symbiotic federalism suggests, potential populist outcry is of particular concern to Delaware largely because of its "pygmy" status.[127] Nationally, Delaware ranks second to last in size.[128] The small wonder manages to dwarf only Rhode Island, and when considering that it edges out the Ocean State by less than 1,000 square miles, perhaps "dwarf" is a generous description.[129] Further, when evaluated by population, Delaware is again found wanting.[130] The corporate law giant has a community only slightly larger than that of Washington D.C., a district that fails to merit congressional voting representation.[131] Why should such a tiny state dictate the corporate law for all of America? This idea is key to the populace awakening required for the perfect storm.

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[123] JAMES SCHAFFER, THEY KNEW THEN, CHARACTER, LOVE, MONEY, LEADERSHIP, AND OTHER SAGE ADVICE, 300 BC–1500 AD 3 (2009) (quoting Publlius).

[124] *See generally* MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000).

[125] Cary, *supra* note 67, at 701.

[126] *Id.*

[127] Kahan & Rock, *supra* note 27, at 1576.

[128] U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/10000.html (last visited Jan 28, 2010).

[129] *Id.*

[130] *Id.*

[131] *Id.*

Over three decades have passed since William Cary first raised the pitchforks against Delaware, and half of a decade has elapsed since Kahan and Rock proposed that it would require a crisis to truly threaten Delaware. However, during the last thirty-six years America has experienced several crises. We have seen corporate fraud and scandal, the collapse of entire industries, skyrocketing and then plummeting interest rates, inflation and deflation, impeachment of presidents,[132] and our nation has gone to war and war has come to our doorstep. At the very moment Kahan and Rock were writing their thesis, the mortgage crisis was brewing. Now today, as the dust settles from the fall of giants like Lehman Brothers, Bear Stearns, and the 378 other major lenders that have failed since late 2006;[133] as we attempt to fill the massive economic hole in our economy where General Motors once was; and as Americans try to regain their faith after being jaded by the perceived injustice of outrageous executive bonuses and the horror that our system permitted Bernard Madoff to command his ponzi scheme virtually unnoticed by authorities, we must ask: why is Delaware still here? If global economic collapse is not sufficient to sink the small wonder, what is?

Although crisis may be necessary, history proves that it is not sufficient. Delaware's strength is not a single competency, rather the collection and interrelation of all its competencies. Likewise, the real threat to Delaware must not be identified in a vacuum. The perfect storm is visible only by considering the aggregate ground gained by all Delaware's threats. The proper image of the perfect storm is not that of a rug being pulled from under the small wonder; rather, it is that of Delaware fighting to defend a sacred island. Although the small wonder maintains several fortified positions, assaults are being mounted on multiple beachheads. This scenario is sufficient to sink even the mighty Delaware.

As this article is being drafted, Congress is discussing the requirement of a mandatory board-level risk committee[134] and the prohibition of CEO board chairmen,[135] which goes further than the current debate occurring in the Delaware Corporate Law Council. Both New York and California are positioning themselves to alter the internal affairs paradigm forever,[136] and dozens of other states have positioned themselves

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[132] More precisely only one president was impeached during this time period, President Nixon resigned prior to impeachment in 1974.

[133] The Mortgage Lender Implode-O-Meter, http://ml-implode.com/ (last visited Jan 28, 2010).

[134] Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. § 5(e)(5) (1st Sess. 2009).

[135] Shareholder Empowerment Act of 2009, H.R. 2861, 111th Cong. § 16A(d)(2) (1st Sess. 2009).

[136] *See* CAL. CORP. CODE § 2115 (West 2010); N.Y. BUS. CORP. LAW § 1317–20 (McKinney 2009); *See also supra* notes 94–98 and accompanying text.

to pick up the pieces should a tipping point be reached. Whether such a perfect storm will be fully realized in the near-term is uncertain; however, the signs of a possible storm are clearly present. Delaware must be alert and mind the signs of such a storm; it must heed the warnings of its sentries. The small wonder must be prepared for more than that suggested by previous commentators. It must be prepared for both horizontal and vertical threats, and it must stand vigilant against both gradual and complete preemption. "Anyone can hold the helm when the sea is calm,"[137] but what should be done when the waves crash down from every direction?

VII. CONCLUSION: HOW TO NAVIGATE THE WATERS WHEN POLITICAL CHANGE IS IN THE AIR

This is an interesting, yet not entirely unique, era. As it has in the past, America is experiencing both substantial crisis and scandal. However today there is a high probability of the often elusive third element of the perfect storm. It appears there may have been an awakening, or at least a stirring, of the populace. In such an environment Delaware's network advantages and minor adjustments along its original bearing may not be sufficient to maintain its preeminence. The keys to successfully navigating the corporate law waters during a perfect storm are three fold: (1) identifying the storm, (2) assessing the environment, and (3) selecting and following the proper bearing. The previous section defined a perfect storm, the following paragraphs will discuss the significance of identifying such a storm, and then the remaining pages will outline a suggested framework for Delaware to follow while navigating this perfect storm.

A. *Identify the Storm*

Delaware's ability to recognize the difference between the "burning platforms"[138] ignited by crisis, scandal, and a changing political climate,

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[137] Schaffer, *supra* note 123, at 3.

[138] Ken Embley, *The Burning Platform,* POLICY PERSPECTIVES, Mar. 29, 2005, http://www.imakenews.com/cppa/e_article000368179.cfm?x=b11,0,w (explaining the term "burning platform" refers to tales of decisions made by oil rig workers on a platform in the North Sea. After an explosion their rig burst into flames and workers were confronted with the decision of staying on the flaming rig, or attempting the hundred foot leap into the freezing waters below. The story is that those who survived were the ones who recognized the difference between normal rig problems that could be corrected and a true "burning platform," and thus avoided certain death by making the leap. The often used quote in the business world referring to this concept is that, "probable death is better than certain death.").

and the normal squabbles of business is essential to its future success. Rick Wagoner, the former CEO of General Motors, failed to recognize the burning platform. Less than two years before he was forced out of his position by the federal government he calmly stated, "our sales and marketing strategy requires patience but its working, and we need to stick with it."[139] Today he is gone. This sort of naïve approach will certainly lead to disaster in a perfect storm. It is not the opinion of this author that Delaware fails to recognize the existence of a problem. In fact, Delaware has already begun to take small steps toward showing the world its awareness of a problem and its intended plan. However, these steps indicate the recognition of a problem, not the recognition of a perfect storm. The Delaware system is comprised of humans, although highly skilled and dedicated, from time to time it is essential for these individuals to genuinely examine Delaware with the courage to recognize, rather than rationalize, that what may have first presented itself as merely a problem, may now actually be a perfect storm.

B. *Assess the Environment*

Assessing the environment is more than identifying the storm. Assessing the environment requires a realistic analysis of not only the current environment in which Delaware operates, but also an analysis of its capabilities. Generally, Delaware's strengths (discussed in section two)[140] are more than sufficient to fend off any individual assault, or even a combination of small assaults. However as we have identified, in a perfect storm Delaware will find itself protecting an island from assaults on nearly every beachhead. Delaware must acknowledge that, with its current strengths, in a perfect storm it cannot successfully defend every beachhead. This assessment of environment and capabilities leads to the decision to select a new bearing.

One commentator argues that the most significant threat to Delaware's corporate law preeminence would be for the Chancery to "attempt to gain complete control over the adjudication of Delaware corporate law cases."[141] Although her argument is fairly well reasoned, it does not account for the perfect storm. I agree that "hubris is dangerous."[142] What is suggested below is not hubris, or arrogance, rather merely recognition of the current corporate law environment followed closely by a series of consistent deliberate actions.

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[139] Robert Farago, *GM Death Watch 120: Definition of Insanity*, GENERAL WATCH: GM SHAREHOLDERS WATCHING GENERAL MOTORS, Apr. 29, 2007, http://www.generalwatch.com/editorials/editor ial.cfm?EdID=.

[140] *See supra* notes 21–56 and accompanying text.

[141] Stevelman, *supra* note 2, at 137.

[142] *Id.*

C. *Select and Follow the Proper Bearing*

Delaware's new bearing (tactics) need not be bold. The bearing may, and arguably should, be consistent with Delaware's original course (strategy). The issue in a perfect storm is not necessarily that the strategy is flawed, rather that the tactics are no longer effective. The small wonder's new bearing must leverage its existing strengths while identifying and executing "asymmetric"[143] tactics. Delaware must identify technology or resources that it may utilize to alter the environment in a perfect storm.

One potential asymmetry that Delaware must consider when selecting its bearing is the people of America. If a perfect storm exists, it is because the third element is present — the people are fed up! If neglected, this fact may permit the federal government to engage in activities that otherwise would not occur. As voters become restless, they may tolerate or even demand legislation that, if previously enacted, would have resulted in the defeat of many incumbent legislators. However if properly positioned, Delaware may leverage the people of America as an asymmetric strength by embracing this asymmetry. If people are fed up, and that anger is directed at an external threat, such as Congress rather than Delaware, the passions of the people will then work to keep Delaware afloat, rather than to sink it.

Change requires a compelling vision for the future and a process to effect that change. However as mentioned above, the new bearing need not be bold. Delaware need not, and should not, abandon its many strengths that provide the certainty needed by businesses and shareholders. Here the key agent of change is the Court of Chancery. Due to the Chancery's non-partisan structure and nimble ability to shape the robust common law, it is an invaluable asset. In a perfect storm, Delaware's future is in the hands of its five capable Vice Chancellors. While on the front line, these men must continue to provide clarity and vision in the words of their opinions. They must take time to articulate not only the status of the law, but also clearly articulate the policy reasons surrounding such law, thus ensuring there is no confusion among shareholders, business leaders, and all Americans that the small wonder is doing no evil; rather, it is aggressively promoting certainty and security.

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[143] Asymmetric tactics are maneuvers which leverage strategy or uncommon technology and resources to offset one's weaknesses or neutralize the strengths of the opposing force, *see* U.S. DEP'T OF THE ARMY, THE U.S. ARMY MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 109 (2007) (describing asymmetric tactics used in Ireland).

A perfect storm is not the time for sporadic minor adjustments, but a time for a swift demonstration of resolve. This resolve need not come through inconsistent changes to the common law that may result in uncertainty. Although appropriate changes should be considered, the immediate focus of the chancellors must include the increased utilization of public praising and shaming of directors, management, and counsel. This seemingly innocuous tool may be the secret to solving the Gordian knot. This is not accomplished by using their position as a bully pulpit for individual gain, but through clear articulation of the motives and rationale of the court, thus promoting transparency. Through this use of the *sinners and saints* of Delaware law, the chancellors can ensure that if America is fed up, the result is an asymmetric strength rather than weakness. Delaware is not an enemy of America; rather, it remains a consistent beacon of certainty, efficiency, and fairness.

When selecting its bearing (tactics), in addition to an increased employment of the *sinners and saints*, Delaware should increase its emphasis on wisely selecting the ground upon which it fights. With assaults on every beachhead, in the short-run it may be beneficial, even required, to focus its efforts on the ground it must not lose rather than defending every fortification. Just as the small wonder wisely chose to defer to the federal courts in the *Bear Stearns* shareholder litigation,[144] the chancery will need to make several more decisive tactical decisions during a perfect storm.

These decisions may even involve issues as significant as a vertical threat to the Internal Affairs Doctrine. Although the IAD is well cited, there is clear doubt as to whether the federal government will continue to follow it in a perfect storm. The safest course is to know when to pick one's battles. This emphasizes the delicate line these five chancellors must navigate. When determining whether or not to yield to federal litigation, the decisions these chancellors must make could determine the fate of corporate law in the future.

The current chancellors have displayed great skill and commitment to highlighting the strengths and efficiency of the Delaware system. Vice Chancellor Strine showcased both his and the Delaware court system's superior legal aptitude while outperforming New York's Federal Judge Conn in recent litigation.[145] However, in a perfect storm these exhibitions of judicial mastery may harm the small wonder. In a perfect storm, the chancellors must be willing to consider the possible employment of alternate tactics. They must be willing to decisively follow the example set by Chancellor Parsons in *Bear Stearns,*[146] where he astutely recognized the

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[144] Bear Stearns, 2008 Del. Ch. LEXIS 46.
[145] In re Topps Co. S'holder Litig., 924 A.2d 951 (Del. Ch. 2007).
[146] *Bear Stearns*, 2008 Del. Ch. LEXIS 46.

dangerously fine line and wisely chose to decline the battle. When the case is sitting before them, and it will, their resolve will be tested. It is up to these five men to recognize that the best decision may not always be to showcase one's superior efficiency, but the best decision may be to allow the other side to take the beach, and expend their resources defending it.

Once the storm has been identified, the environment assessed, and the bearing selected, it must be followed — the tactics must be executed. Delaware must ensure both that the plan is carried out, and that it simultaneously keeps a watchful eye open, ready to identify the next perfect storm.